

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter Of )  
 )  
 **MARC SOBEL** )  
 )  
 Application for Certain Part 90 )  
 Authorizations in the Los Angeles )  
 Area and Requestor of Certain )  
 Finder's Preferences )  
 )  
 **MARC SOBEL AND MARK SOBEL** )  
 **D/B/A AIR WAVE** )  
 **COMMUNICATIONS** )  
 )

WT Docket No. 97-56

**RECEIVED**  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

**COMMENTS OF JAMES A. KAY**

1. James A. Kay, by his attorneys, submits his Comments on the "Supplement to Petition to Defer and Consolidate Consideration," filed by Marc D. Sobel d/b/a Air Wave Communications ("Sobel") on November 29, 1999. In support, Kay respectfully submits the following:

2. On March 2, 1999, Sobel filed a "Petition to Defer Action and Consolidate Consideration," in which Sobel asked the Commission to defer its review of the Initial Decision of Administrative Law Judge John M. Frysiak (FCC 97D-13), released November 28, 1999, pending the issuance of an Initial Decision in WT Docket No. 94-147 (hereinafter referred as "Kay Proceeding") and take into consideration the Initial Decision in the Kay Proceeding to the extent it bears on the issues under review in the Sobel proceeding.

3. On September 10, 1999, the Initial Decision of Chief Administrative Law Judge Joseph Chachkin (FCC 97D-13) was released. In that decision, all issues were resolved in Kay's

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favor, including the issues relating to the relationship between Kay and Sobel and the impact of the Sobel I.D. on Kay's qualification. Sobel urges that the Commission take cognizance of the findings and conclusions of Chief Administrative Law Judge Chachkin in the Kay Proceeding and, predicted on those findings and conclusions, resolve the substantive issues in Sobel's favor -- specifically, the transfer of control issue and the candor issue. Kay agrees with Sobel's position.

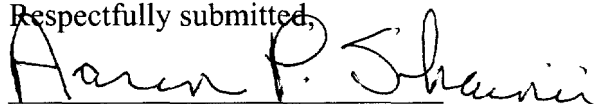
4. Judge Chachkin's Initial Decision at paragraph 209 states the following: "The issue as framed by Judge Sipple seeks to determine '[w]hether based on the findings and conclusions reached in MT Docket No. 97-56 concerning Kay's participation in unauthorized transfer of control. Kay is basically qualified to be a Commission licensee.' [footnote omitted.] It is concluded that such findings and conclusions do not render Kay unfit to be a Commission licensee." At paragraph 210, the Judge explains. "As discussed in Findings 168 and 169, the Sobel conclusion that Sobel is unfit to be a licensee was tainted by the fact that the Bureau deliberately concealed the fact that Kay provide to the Bureau a copy of the Management Agreement in March 1995. The Bureau did more than conceal this critical information. It falsely stated in its October 31, 1997 Comments to Kay's and Sobel's pleadings relating to the misrepresentation issue that "none of Sobel's or Kay's filings in 1994, or in 1995, disclosed the relationship between Sobel and Kay with respect to the Management Agreement stations." [footnote omitted]. Thus, Judge Frysiak erroneously assumed that the Bureau first obtained a copy of the Management Agreement in July 1996, in response to a letter of inquiry to Sobel. See Judge Frysiak's Initial Decision, 12 FCC Rcd at 22902, para. 74, 77. There is no doubt that his ultimate conclusion that Sobel "made misrepresentations and lacked candor under the transfer of control" (para. 78) was based on his erroneous assumption as to when the agreement was given

to the Bureau. In light of these considerations, Judge Frysiak's conclusion must be disregarded in determining Kay's fitness to be a licensee." Clearly, this language is equally applicable to the resolution of the issue in the Sobel proceeding.

5. With respect to the misrepresentation and lack of candor issues, Judge Chachkin concluded at paragraph 218 the following: "The Bureau has not offered even a shred of evidence that Kay and Sobel intended to deceive the Commission about their Management Agreement. On the contrary, the record shows that Kay and Sobel have been open and straightforward with the Commission. The misrepresentation issue is resolved in favor of Kay."

6. It is difficult to reconcile the two decisions on these issues. Judge Chachkin, however, has demonstrated the blatant misconduct of the Wireless Bureau which occasioned Judge Frysiak being misled. In this regard, the Judge, at footnote 49 of his Decision, states the following: "This Judge has never seen prosecutorial misconduct of this magnitude in the 20 years he has presided over Commission cases. Such misconduct cannot be countenanced. It is completely contrary to the Commission's duty and responsibility to treat all licenses in a fair and even-handed manner." Kay urges that in light of the findings and conclusions of Judge Chachkin in his Initial Decision, the Sobel decision should be overturned consistent with the those findings and conclusions.

Respectfully submitted,



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Dated: December 8, 1999

**CERTIFICATE OF SERVICE**

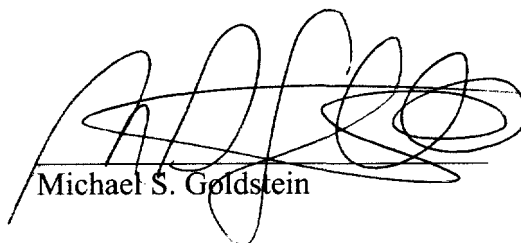
I, Michael S. Goldstein, secretary at the law firm of Shainis & Peltzman, Chartered, hereby certify that on this 8th day of December, 1999, I mailed via first-class U.S. mail, postage pre-paid, a copy of the foregoing pleading to the following:

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